NO. 13394

IN THE

United States Court of Appeals

For The Ninth Circuit

JOHN PALAKIKO, et al.,
Appellants,

vs.

JOE C. HARPER, Warden of
Oahu Prison,
Appellee.

Answering Brief of Appellee

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JURISDICTION

This is an appeal from a final judgment and order of the Supreme Court of the Territory of Hawaii denying relief and remanding appellants to custody in a habeas corpus case wherein appellants, John Palakiko and James Edward Majors, sought to set aside their conviction for a capital offense.[1]

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[1]The Judgment and Order is set forth in the Appendix, p. 71. This appeal is being prosecuted on the

Jurisdiction to review the judgment and order is conferred on this Court by 28 U.S.C. sec. 1293.

STATEMENT OF THE CASE

Since appellants' opening brief does not contain a statement of the case in the usual form, the appellee submits the following statement.

The appellants, John Palakiko and James Edward Majors, were tried and convicted of murder in the first degree and sentenced to death in the Circuit Court of the First Judicial Circuit of the Territory of Hawaii in Cr. No. 19955, *Territory of Hawaii* v. *John Palakiko and James Edward Majors.* The Supreme Court of Hawaii reviewed these convictions on writ of error and affirmed the judgment. *Territory* v. *Palakiko, et al.*, 38 Haw. 490. Appellants then appealed their convictions to this Court, which affirmed the judgment of the Supreme Court of Hawaii. *Palakiko* v. *Territory of Hawaii*, 188 F.2d 54 (CA 9th).

On September 7, 1951, the Governor of Hawaii executed death warrants for Palakiko and Majors.

Late the night before the day set for execution, Mary Palakiko, a sister of appellant Palakiko, presented a petition for a writ of habeas corpus to Justice

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original records of the Supreme Court of Hawaii, which have been transmitted to the clerk of this Court. There is no printed record. The order of this Court requires "that the parts of the original record pertinent to the contentions of the parties shall be added as appendices to their briefs." Order filed February 8, 1952. Accordingly, this brief is accompanied by an appendix containing portions of the record referred to in the brief.

Le Baron of the Supreme Court of Hawaii.[2] The Justice denied the petition but stayed execution and referred the petition to the full court. *Application of Palakiko and Majors*, 39 Haw. 141. The court then issued a writ of habeas corpus, to which the appellee made a return.[3] The appellants filed a traverse.[4] With issue thus joined the court then held what it described as "the lengthiest hearing in the history of this court" and upon such hearing denied relief and remanded the appellants to custody. *Application of Palakiko and Majors*, 39 Haw. 167. This appeal is taken from the judgment entered pursuant to the decision.

The appellants by their traverse in the habeas corpus proceeding attacked the validity of their convictions on the following grounds: (1) that they were secured by confessions involuntary in fact and in law; (2) that they were based on an unconstitutional statute; (3) that the appellants were denied assistance of counsel; and (4) that the appellants were unlawfully detained.[4A] During the hearing before the full court the appellants by amendment to the traverse alleged two additional grounds for relief, as follows: that the convictions were void because (5) the appellants were denied a fair trial in that they were tried and convicted in an atmosphere of public clamor for their conviction which made it impossible for them to obtain a fair and impartial grand and petit jury and a fair and impartial trial; and (6) that the general verdict of "guilty as charged" returned by the jury was inconsistent with the indictment, which contained three counts, in that two of the three counts

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[2]App. p. 1
[3]App. p. 11
[4]App. p. 35
[4A]App. p. 35

were "mutually exclusive", that one of the counts did not charge murder in the first degree, and that the evidence was insufficient to sustain a verdict of murder in the first degree on all three counts.[5]

Of the six contentions made by the appellants, two were questions purely of law. On the remaining four issues, oral testimony totalling 2,276 pages of transcript was received in addition to numerous exhibits. The complete record of the criminal prosecution was also made part of the record in this case. The materiality of some of the evidence might be disputed but the court, in pursuance of an express policy to afford the appellants every opportunity and latitude for proving their case, received evidence even remotely related to the issues, except in a few instances where admissibility was barred by some well-established rule of exclusion. For the purposes of this brief the evidence may be summarized under the following topics: A. The crime, B. Palakiko's confession to the murder of Mrs. Wilder, C. Majors' confessions to the murder of Mrs. Wilder, D. Assistance of counsel, and E. Alleged mob domination and denial of a fair trial.

A. The crime.

On March 10, 1948, appellants Palakiko and Majors escaped from a prison work gang in Honolulu.[6] Majors was then serving a sentence for second degree burglary[7] and Palakiko was serving a federal sentence for highway robbery in Oahu Prison.[8]

After leaving the work gang, the appellants fled

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[5]App. p. 68
[6]App. p. 73
[7]App. p. 31
[8]App. p. 74

into Nuuanu Valley and spent the night in the hills.[9] The following day, March 11, 1948, they worked their way back down the valley, entered the yard of Frank E. Midkiff and stole two raincoats and two bottles of citronella oil.[10] That evening they came upon the home of Mrs. Theresa Wilder, an elderly woman who lived alone,[11] ascertained she was by herself[12] and broke into the house.[13] Upon entry, they came upon Mrs. Wilder.[14] She ran towards the parlor door screaming. Palakiko grabbed and held her hands while Majors struck her on the mouth, knocking her false teeth out and felling her.[15]

After binding her feet and placing a towel over her mouth, they carried their victim into a bedroom and placed her on a bed.[16] While she was on the bed, Majors removed the woman's slacks and pulled her panties down.[17]

Majors made three separate statements concerning the crime. There is a variance in the statements as to whether he committed rape or attempted rape of Mrs. Wilder. In his first statement (March 21, 1948) Majors said he merely pulled down the woman's pants to see "if she no was too old, maybe I could use 'um, but she was too old."[18] However, prior to making his second statement Majors told detectives that "I fuck um",[19] and in his second statement (March 22, 1948) Majors admitted that he had sexual intercourse with

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[9]App. p. 77
[10]App. p. 78
[11]App. p. 79
[12]App. p. 81
[13]App. p. 82
[14]App. p. 86, see also n. 11, p. 78, and n. 13, p. 82
[15]App. p. 88
[16]App. p. 91
[17]App. p. 93
[18]App. p. 94
[19]App. p. 95

his victim.[20] Then in his third statement (March 24, 1948) Majors said that he masturbated, got on top of Mrs. Wilder and tried to spread her legs by using his knees but denied having intercourse.[21]

While Majors was on the bed with Mrs. Wilder, Palakiko entered the bedroom and struck her twice on the chin, and Majors struck her once.[22]

After the criminal attack, the appellants left the house, proceeded down the valley and spent the night under a house.[23]

The following evening, March 12, 1948, at 9:00 p.m. Palakiko was captured while attempting to steal a car[24] but Majors managed to escape and was not recaptured until March 21, 1948.[25]

Mrs. Wilder's body was discovered on March 16, 1948,[26] apparently in the same position that the appellants had left her on the evening of March 11. The body was partly disrobed and in a state of moderate decomposition. Her wrists and ankles were bound and her mouth was gagged. Her right eye was contused and there were abrasions on the left chin with a moderate amount of caked blood about her mouth, nose and on the pillow under her head. Her lower denture was still lying on her chest immediately below the chin. There were four distinct fractures of the lower jaw.[27]

B. Palakiko's confession to the murder of Mrs. Wilder.

Upon his recapture Palakiko was taken to the Hono-

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[20]App. p. 96
[21]App. p. 97
[22]App. p. 99
[23]App. p. 101
[24]App. p. 102
[25]App. p. 106, see also n. 76, p. 210
[26]App. p. 107
[27]App. p. 108

lulu police station[28] where he was held until March 17, 1948, when he was returned at 9:25 a.m. to Oahu Prison.[29]

While Palakiko was detained at the police station he was in a cell with three other prisoners[30] and he was questioned on two or three occasions, first, about a burglary at Kapena Lane to which he admitted guilt[31] and second, about an axe and his whereabouts during his escape.[32]

On March 18, 1948, a detective questioned Palakiko at Oahu Prison concerning a cigarette lighter for approximately fifteen or twenty minutes.[33]

At 5:00 p.m. on March 20, 1948, Palakiko was brought to the Honolulu Police Station[34] and taken to Captain Kennedy's office[35] where he was questioned by Captains Straus and Kennedy[36] for about thirty minutes regarding his whereabouts during his escape and about the raincoats which were stolen from the Midkiff home.[37] Straus and Kennedy left the office at approximately 5:30 p.m.[38]

The evidence is conflicting as to what happened during the next two hours, that is until 7:30 p.m.

Palakiko testified that when Straus and Kennedy left the office Detective King entered the room alone[39] and "busted me in the stomach about four times";[40] that a few seconds later Detective Stevens entered the

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[28]App. p. 102, n. 24
[29]App. p. 111
[30]App. p. 112
[31]App. p. 113
[32]App. p. 113, n. 31
[33]App. p. 116
[34]App. p. 117
[35]App. p. 118
[36]App. p. 119
[37]App. p. 119, n. 36
[38]App. p. 119, n. 36
[39]App. p. 121
[40]App. p. 121, n. 39

office and struck him on the left cheek,[41] whereupon he, Palakiko, hit his left eyebrow against the wall and his right eye against the corner of a map,[42] from which he received a cut over his left eye that bled[43] for several hours[44] and a cut over his right eye that did not bleed.[45] Palakiko admitted on cross-examination that he did not know of the cut over his right eye until he saw it in a newspaper picture of himself sometime later.[46] Palakiko further testified that after Stevens hit him in the office he was hauled to a "quiz room" where Stevens beat him in the "guts" for fifteen or twenty minutes,[47] until he said he would talk.[48] Palakiko said he was then returned to the Captain's office where a statement was taken from him commencing at 5:55 p.m.[49]

In support of Palakiko's testimony, his mother, two aunts and a sister testified that they saw him on March 22, 1948, and that he had a bloody cut over his left eye and also cuts over his right eye and on his left cheek, and that his face was swollen and black and blue.[50]

According to the police officers, however, when Straus left the office, Detectives King and Schneider entered the room together[51] and questioned Palakiko for about thirty minutes[52] regarding the raincoats and citronella oil[53] and King was never alone with Palakiko.[54] When Schneider and King finished questioning

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[41] App. p. 121, n. 39
[42] App. p. 121, n. 39
[43] App. p. 124
[44] App. p. 125
[45] App. p. 128
[46] App. p. 129
[47] App. p. 132
[48] App. p. 132, n. 47
[49] App. p. 133
[50] App. p. 134
[51] App. p. 156
[52] App. p. 158
[53] App. p. 159, see also n. 52, p. 158
[54] App. p. 160

Palakiko, Detective Stevens entered the office to guard Palakiko,[55] and remained alone with Palakiko for about five minutes.[56] Then Stevens opened the door and called in Straus,[57] whereupon Stevens left and Straus entered and remained in the office for thirty-five or forty minutes talking to Palakiko.[58] Straus then walked out, requested Kennedy and a reporter to join them, and in their presence Palakiko gave a statement commencing at 6:50 p.m. and concluding at 7:38 p.m.[59]

All of the police officers, prison guards and the acting public prosecutor who saw Palakiko on the evening of March 20, 1948, or shortly thereafter, testified that Palakiko was not subjected to any violence, coercion, threats or promises of immunity,[60] and none of these witnesses saw or noticed any cuts or wounds on Palakiko, nor did they notice anything unusual about his face.[61] Only one officer, Captain Kennedy, noticed any mark at all on Palakiko, which he described as a scar.[62]

Two newspaper photographers and a reporter who saw Palakiko on the evening of March 20th likewise noticed nothing unusual about his face and none saw any cuts, bruises or marks,[63] except newspaper photographer Ebert, who noticed over Palakiko's right eye "an old mark, scar or an old injury".[64]

After Palakiko made his statement, a photograph

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[55]App. p. 161
[56]App. p. 161, n. 55
[57]App. p. 162
[58]App. p. 164, see also n. 57, p. 162
[59]App. p. 165
[60]App. p. 167
[61]App. p. 172
[62]App. p. 188
[63]App. p. 190
[64]App. p. 192

of him was taken by police photographer Cunningham.[65]

A group of officers and Palakiko then went to the Wilder home where Palakiko completed his statement with a reenactment of the crime.[66] This statement at the Wilder home was made from 8:05 to 8:40 p.m.[67]

The group then returned to the police station[68] where several pictures of Palakiko were taken by newspaper photographers.[69]

The next morning, March 21, Palakiko was questioned from 11:58 a.m. to 12:03 p.m. by Captain Straus in the presence of acting public prosecutor Desha.[70] On March 21 Palakiko asked if he could see his family,[71] and the following day his mother,[72] two aunts[73] and a sister[74] called at the police station and saw Palakiko. Palakiko further testified that when he signed his confession, he did so freely and voluntarily.[75]

On the question of fact of the voluntariness of Palakiko's confession, the court below found Palakiko's testimony to be false and that the confession was not in any way coerced. *Application of Palakiko and Majors*, 39 Haw. 167, 176, 178.

C. Majors' confessions to the murder of Mrs. Wilder.

As soon as Palakiko confessed, implicating Majors, efforts to recapture Majors were intensified. Majors

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[65]App. p. 194
[66]App. p. 196
[67]App. p. 197
[68]App. p. 198
[69]App. p. 198
[70]App. p. 200
[71]App. p. 203
[72]App. p. 204
[73]App. p. 205
[74]App. p. 207
[75]App. p. 208

was recaptured at a roadblock at Kaneohe, a town about fifteen miles from Honolulu, shortly after midnight on March 21, 1948.[76] As he was being arrested he drank a bottle of iodine.[77] The arresting officer rushed Majors to a nearby emergency hospital in Kaneohe where his stomach was pumped out.[78] The investigating officers went to the hospital and there Captain Straus asked him a few questions.[79] Majors was thereafter transferred to Queen's Hospital in Honolulu[80] where he remained until March 24, 1948.[81]

Detective Stevens questioned Majors at Queen's Hospital for about one hour beginning at approximately 2:55 a.m. on March 21, 1948.[82] Later the same morning Stevens returned to the hospital and questioned Majors commencing at about 10:15.[83] Shortly thereafter, Captain Straus came to the hospital with a reporter, and a statement was taken from 10:45 a.m. to 11:30 a.m.[84] According to Dr. Rhead, the attending physician, Majors had been given four grains of phenobarbital at 4:30 a.m. March 21, 1948,[85] and his throat was burned by the iodine,[86] but he was physically and mentally capable of making a statement at 10:45 a.m. on March 21.[87]

The same evening, March 21, 1948, in the presence of Officer Donlin, who was on duty guarding Majors, Majors told Dr. Darrow, also of Queen's Hospital,[88] that he and Palakiko entered Mrs. Wilder's home, beat

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[76]App. p. 210
[77]App. p. 211
[78]App. p. 212
[79]App. p. 213
[80]App. p. 214
[81]App. p. 215
[82]App. p. 215
[83]App. p. 216
[84]App. p. 217
[85]App. p. 221
[86]App. p. 221
[87]App. p. 222
[88]App. p. 224

her, and left her bound and gagged on a bed.[89]

The following day, March 22, 1948, Detective Stevens and Officer Harris went to Queen's Hospital at about 1:45 p.m. to see Majors.[90] A preliminary conversation was had for about three quarters of an hour.[91] A reporter was called to the hospital and a second statement was given from 2:50 p.m. to 3:17 p.m.[92]

While Majors was at Queen's Hospital two of his sisters visited him on March 22, 1948.[93] They remained with Majors about thirty minutes.[94] The next day a third sister called at the hospital and saw Majors.[95]

On the morning of March 24, 1948, Majors asked a police officer at the hospital to call Captain Straus because he wanted to give Straus a statement.[96] Straus went to Queen's Hospital shortly before 9:00 a.m. and Majors informed him that "When we get down to the station I will tell you the truth."[97] Straus and Majors went to the Police Station where, with Palakiko present, Majors gave a third statement.[98] This statement was taken between 8:59 a.m. to 10:24 a.m.[99] Palakiko when asked during the questioning if Majors was telling the "right story", replied, "right story . . . yes."[100]

The third confession of Majors was presented to him for signature by Detective Edmondston on March 25, 1948.[101] Majors examined the statement, made sev-

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[89]App. p. 226
[90]App. p. 227
[91]App. p. 228
[92]App. p. 229
[93]App. p. 232
[94]App. p. 234
[95]App. p. 235
[96]App. p. 236
[97]App. p. 237
[98]App. p. 238
[99]App. p. 238, n. 98
[100]App. p. 240
[101]App. p. 240

eral corrections [102] and signed it.[103]

The two prisoners were returned to Oahu Prison on March 26, 1948.[104]

Majors admitted that at no time was he subjected to any violence[105] but asserted that he was tricked[106] and threatened by Stevens,[107] and that when given his transcribed statement for signing, Edmondston promised he would be charged with second degree murder.[108]

All such threats, promises and tricks were denied by the police officers, both in the criminal trial and at the habeas corpus hearing.[109]

As in the case of Palakiko's confession, the Supreme Court found that Majors' confessions were in fact given voluntarily. *Application of Palakiko and Majors*, 39 Haw. 167, 177-178.

D. Assistance of counsel.

Neither Majors nor Palakiko saw an attorney before giving their confessions, but there is no evidence that they requested counsel.

Palakiko's mother, father and sister retained Attorney T. S. Goo to represent Palakiko about two weeks after they saw him at the Police Station.[110] Majors' sisters retained Attorney Bert Kobayashi to represent Majors shortly after Majors left Queen's Hospital.[111] Sometime later Mr. George Kobayashi also became

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[102]App. p. 241
[103]App. p. 243
[104]App. p. 245
[105]App. p. 246
[106]App. p. 247, n. 107
[107]App. p. 247
[108]App. p. 250
[109]App. p. 251
[110]App. p. 275
[111]App. p. 280

associated as an attorney for the appellants.[112]

The attorneys thus retained in early April visited the two prisoners at Oahu Prison on at least three occasions.[113] Further opportunity for consultation with counsel was had in court on May 7, 1948, when appellants were arraigned,[114] and on June 3, 1948, when the trial court formally appointed the attorneys who had been previously retained by their relatives.[115] The formal appointment was made in order that they would be entitled to compensation out of the funds of the court.

On June 7, 1948, the attorneys for the defense stated to the court that they were ready for trial.[116]

Throughout the trial in the Circuit Court, on appeal to the Supreme Court and finally on appeal to this Court, Majors and Palakiko were represented by these same three attorneys. Appellants have admitted them to be competent.[117]

The Supreme Court found that appellants had timely and effective assistance of counsel. *Application of Palakiko and Majors*, 39 Haw. 167, 180-181.

E. Alleged mob domination and denial of a fair trial.

The murder of Mrs. Theresa Wilder attracted considerable public attention.[118]

The Chamber of Commerce offered a reward of $1,500 for the apprehension and conviction of the murderers of Mrs. Wilder.[119] The Board of Supervisors

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[112]App. p. 282, n. 113
[113]App. p. 282
[114]App. p. 284
[115]App. p. 285
[116]App. p. 286
[117]App. p. 287, see also 39 Haw. 167, 180-181
[118]Pet. Ex. 5, 6. Resp. Ex. A, B.
[119]App. p. 289

of the City and County of Honolulu likewise offered a reward.[120]

Upon their arrest, numerous newspaper articles described Palakiko and Majors as "killers" and "slayers".[121] The fact that the appellants had confessed to the murder of Mrs. Wilder was also reported by the press.[122]

Acting Public Prosecutor Desha announced publicly that the strongest charge that could be placed against the appellants was second degree murder.[123] Two attorneys, Mr. Hite and Mr. Steadman, urged the acting prosecutor to charge the prisoners with first degree murder.[124] The acting prosecutor refused.[125]

Mr. Hite and Mr. Steadman urged the Mayor to fill the office of Public Prosecutor for the City and County of Honolulu,[126] which had been vacant for ten months.[127] Subsequently, Mr. Hite was appointed Public Prosecutor.[128] He took Mr. Desha off the case[129] and assigned it to Mr. Hawkins.[130]

Mr. Desha testified that if he had defended the appellants he would have moved for a change of venue,[131] as he did not think they could have obtained a fair and impartial trial in the first circuit.[132]

On the other hand, Mr. Tavares and Mr. Cades, both of whom had been President of the Hawaii Bar Association, testified that they saw no reason why the appel-

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[120]App. p. 290
[121]Pet. Ex. 5, 6
[122]Pet. Ex. 5, 6
[123]App. p. 292
[124]App. p. 294
[125]App. p. 296
[126]App. p. 297
[127]App. p. 298
[128]App. p. 299
[129]App. p. 299
[130]App. p. 301, see also n. 129, p. 299
[131]App. p. 301
[132]App. p. 302

lants could not have obtained a fair trial in the Hawaiian courts or in the first circuit.[133] They both testified that there was no mob hysteria or similar feeling that would have prevented a fair trial.[134]

The attorneys for the appellants did not ask for a change of venue.

All prospective jurors were carefully examined by the attorneys for the defense and by the court.[135] There was no showing that any juror was in fact prejudiced by newspaper stories or by public opinion.

No evidence of any interference with the trial or intimidation of witnesses or the jury was offered at the habeas corpus hearing.

The confessions reported by the newspapers were duly introduced into evidence.[136]

On the question of a fair trial, the Supreme Court found that the claim of appellants was without merit. *Application of Palakiko and Majors*, 39 Haw. 167, 178-180.

SUMMARY OF ARGUMENT

The argument is opened with a consideration of the scope of the remedy of habeas corpus in the Territory of Hawaii. The question was raised at the very outset of this habeas corpus proceeding by appellee's contention that the issue of the voluntariness of appellants' confessions may not be relitigated, the issue having been raised and determined in the murder trial and the appeals from the conviction therein. It

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[133]App. p. 304
[134]App. p. 310
[135]App. p. 311
[136]Prosecution's Ex. 54, 55, 56, 57

is noted that the ruling of the court below limiting the scope of the remedy is in line with decisions of this Court and other courts of appeals. It is further submitted that the question is one of local law upon which this Court would not overrule the Supreme Court of Hawaii.

The ruling, however, was not given until after the hearing on the facts, which was indeed a very extended hearing. The next part of the argument is devoted to a review of the evidence adduced on the issue of coercion. It is shown that the findings of the court below rejecting the claim of coercion are sustained by the evidence and should not be disturbed.

The various other grounds asserted by appellants for reversal are then considered in order. The inapplicability of the *McNabb* rule (*McNabb* v. *United States*, 318 U.S. 332) to the instant case is demonstrated, both as a matter of law and of fact.

The constitutional rights to assistance of counsel and to a fair trial are next considered. It is shown that appellants did have the assistance of counsel at all stages of the proceedings at which they were entitled to such assistance and that there was no mob domination or any other interference with the trial such as to constitute a denial of the right to a fair trial.

It is followed by an examination of appellants' attacks on the constitutionality of the murder statute and the validity of the verdict of the jury, both of which are shown to be without merit, following which appellants' charges of suppression of evidence and use of perjured testimony by prosecuting authorities are refuted. Finally, after a reference to the rule that de-

fenses in criminal cases may not be reserved as grounds for collateral attack on the judgment, the remaining grounds urged by appellants are briefly considered and all shown to be likewise without merit.

It is concluded that the judgment should be affirmed.

ARGUMENT

I

THE ISSUE OF THE VOLUNTARINESS OF APPELLANTS' CONFESSIONS HAVING BEEN RAISED AND LITIGATED AT THE CRIMINAL TRIAL AND TO FINAL APPELLATE DETERMINATION, IT CANNOT BE RELITIGATED IN THIS HABEAS CORPUS PROCEEDING.

A. Scope of habeas corpus in Hawaii.

Writs of habeas corpus are issued by courts and judges of the Territory of Hawaii pursuant to sections 10351, 10352 and 10353 of the Revised Laws of Hawaii 1945. The pertinent portions of the statute read as follows:

> "*Sec. 10351. Writ, when issuable of right.* Every person restrained of his liberty, except in the cases mentioned in the following section, may prosecute a writ of habeas corpus as of right, according to the provisions of this chapter, to obtain relief from such restraint, if unlawful.
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> "*Sec. 10352. Except in certain cases.* The following persons shall not be entitled, as of right, to demand and prosecute the writ:
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> "1. Persons committed for felony, or for suspicion thereof, or as accessories before the fact, to a felony, when the cause is plainly and spe-

cially expressed in the warrant of commitment, unless when excessive and unreasonable bail is required.

"2. Persons convicted, or in execution upon legal process, civil or criminal.

"*Sec. 10353. Issuable by whom; when not of right.* The supreme court, the justices thereof and the circuit judges may in their discretion issue writs of habeas corpus in cases in which such writs are not demandable of right as well as in cases in which they are demandable of right."

The statute is obviously meager; it does little to define the scope or extent of the remedy; hence, the matter is left to judicial determination.

The principal defense of appellants Majors and Palakiko in their trial for murder was the contention that their confessions were involuntary. The contention was strenuously urged on writ of error to the Supreme Court of Hawaii, *Territory* v. *Palakiko et al.*, 38 Haw. 490, and again pressed on appeal to this Court, *Palakiko* v. *Territory of Hawaii*, 188 F.2d 54. In view of those facts, at the outset of the habeas corpus proceeding appellee contended that the issue of the voluntariness of appellants' confessions could not be relitigated.[137] The court below nevertheless admitted evidence bearing on the issue, the taking of such evidence having in fact accounted for the greater part of the extended hearing. However, in its decision the Supreme Court of Hawaii ruled that having been represented by counsel at their criminal trial and the issue of coerced confessions having been raised and litigated in the trial and on appeal to final appellate

[137]App. p. 322

determination, appellants could not relitigate the issue in a habeas corpus proceeding. The court below stated on this point:

> "It is the settled general rule in this jurisdiction that a writ of habeas corpus cannot be used for the purposes of a writ of error or other mode of appellate review and that it does not lie to correct mere errors in the proceedings below, provided only that the court whose judgment or sentence is challenged has jurisdiction of the subject matter and of the person of the defendant. (*In re Abreu*, 27 Haw. 237; *In re Gamaya*, 25 Haw. 414; *In re Y. Anin*, 17 Haw. 338; *Ex Parte Smith*, 14 Haw. 245; *Ex Parte Fugihara Oriemon*, 13 Haw. 102; *In re Titcomb*, 9 Haw. 131; *In re Apuna*, 6 Haw. 732) . . . reasons in the form of exceptional circumstances, however, may permit habeas corpus to serve for an appeal. Such circumstances are ones 'where the need for the remedy afforded by the writ of habeas corpus is apparent.' (*Bowen* v. *Johnston*, 306 U.S. 19, 27) . . . But no need for the remedy afforded by the writ of habeas corpus exists where a defendant was represented by counsel and has litigated issues of coerced confessions to final determination in exhaustion of appellate remedy . . . A defendant may not litigate issues at trial and on direct attack exhaust his appellate remedies, as Palakiko and Majors did in this case, and then supersede those remedies on collateral attack, by habeas corpus, concerning the same issues which are admissive of the jurisdiction of the trial court to determine them.
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> . . .
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> ". . . As to those confessions, the case of Palakiko and Majors is merely one of relitigation and redetermination of issues already litigated to final appellate determination. This court finds

no occasion to redetermine those issues on habeas corpus, other than for the purpose of exposing the apparent attempt of the allegations of petition and traverse to clothe the case with a character which it does not have."

Application of Palakiko and Majors, 39 Haw. 167, 170-171, 173

B. Scope of remedy in federal jurisdictions.

The rule adopted by the Supreme Court of Hawaii in the instant case is in accord with all decisions of federal courts of appeals where that issue was considered. *Vermillion* v. *Zerbst*, 97 F.2d 347 (CA 5th); *Burall* v. *Johnson*, 134 F.2d 614 (CA 9th), cert. denied 319 U.S. 768; *Miller* v. *Hiatt*, 141 F.2d 690 (CA 3rd); *Cash* v. *Huff*, 142 F.2d 60 (CA 4th), cert. denied 323 U.S. 747; *Eury* v. *Huff*, 146 F.2d 17 (CA D.C.); *Smith* v. *United States*, 187 F.2d 192 (CA D.C.), cert. denied 341 U.S. 927; *Schramm* v. *Brady*, 129 F.2d 108 (CA 4th), cert. denied 317 U.S. 632; *Snell* v. *Mayo*, 173 F.2d 704 (CA 5th), cert. denied 338 U.S. 905. See also *Dorsey* v. *Gill*, 148 F.2d 857 (CA D.C.), cert. denied 325 U.S. 890.

The rule is well stated in *Burall* v. *Johnson*, 134 F.2d 614 (CA 9th), cert. denied 319 U.S. 768, thus:

"In February 1939, after a jury trial in which he was represented by counsel, appellant was convicted in a federal court in Illinois of a violation of the postal laws—assaulting a custodian and robbing the mails—and was sentenced to imprisonment for a period of twenty-five years. He petitioned the court below for a writ of habeas corpus, asserting that he had been denied due process in that he was convicted on the evidence of a confession secured from him by duress,

threats, and promises, being forced thereby to become a witness against himself. The petition was denied and the petitioner appeals.

"It appears on the face of the application that the court had jurisdiction of the person and of the offense charged. No appeal was taken from the judgment of conviction. This is not a situation where, as in Waley v. Johnston, 316 U.S. 101, 62 S.Ct. 964, 86 L. Ed. 1302, a plea of guilty was induced by coercion. The writ of habeas corpus can not be used as a writ of review, or as a means of correcting error in the admission of evidence. Bowen v. Johnston, 306 U.S. 19, 23, 59 S.Ct. 442, 83 L. Ed. 455; Johnston v. Zerbst, 304 U.S. 458, 467, 58 S.Ct. 1019, 82 L.Ed. 1461; Harlan v. McGourin, 218 U.S. 442, 31 S.Ct. 44, 54 L. Ed. 1101, 21 Ann.Cas. 849; Vermillion v. Zerbst, 5 Cir., 97 F.2d 347. The time to inquire into the circumstances of the confession was during the progress of the trial, and error committed, if any, was subject to correction on appeal."

134 F.2d 614

However, appellants cite several federal cases as authority that habeas corpus may be resorted to for relief from convictions obtained with coerced confessions. (Op. Br., p. 141) Of the cases so cited, *Waley* v. *Johnston*, 139 F.2d 117 (CA 9th), and *Decatur* v. *Hiatt*, 184 F.2d 719 (CA 5th), are not at all in point, as they involved allegedly coerced pleas of guilty. In the other federal cases cited, *Smith* v. *Lawrence*, 128 F.2d 822 (CA 5th), *Sedorko* v. *Hudspeth*, 109 F.2d 475 (CA 10th), *Sharpe* v. *Commonwealth of Kentucky*, 142 F.2d 213 (CA 6th), and *Maye* v. *Pescor*, 162 F.2d 641 (CA 8th), the district courts apparently did hear evidence regarding the voluntariness of con-

fessions but in each instance found the confessions to be voluntary, as did the court below in the instant case. But in those cases the question of the scope of the remedy apparently was not called to the attention of the district court or urged on appeal. In any event, relief was denied.

Neither is *Lisenba* v. *California*, 314 U.S. 219, also cited by appellants (Op. Br. p. 138), authority for the contention urged by the appellants that they are entitled to habeas corpus relief on the ground that their confessions were involuntary. There, both a criminal case and a habeas corpus case were before the Supreme Court at the same time. In the habeas corpus case (case No. 5), the contention was that the prosecution used perjured testimony to obtain the conviction, while the question of the voluntariness of the confession was an issue in case No. 4, which was a direct attack on the conviction.[138]

One other case merits consideration in this connection. In *Jennings* v. *Illinois*, 342 U.S. 104, it was alleged that coerced confessions were used to obtain convictions and that the petitioners were unable to have their convictions reviewed by writ of error. The court held that if the allegations were true and if their claims had not been waived at or after trial, petitioners were in custody in violation of federal constitutional rights. However, footnote 9 of the Court's opinion on page 110 and Mr. Justice Frankfurter's dissent at pages 113 and 114 indicate that if the claim could have been raised in the criminal trial and reviewed upon direct review, but had not been, no substantial federal question would have been present.

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[138]314 U.S. 219, 222

On remand of the *Jennings* case to the Supreme Court of Illinois, the Illinois court in further remanding the case to the trial court and directing the trial court to hear evidence regarding the voluntariness of the petitioners' confessions, *People* v. *Jennings*, 411 Ill. 21, 102 N.E.2d 824, stated:

> ". . . Of course, as held in People v. Dale, 406 Ill. 238, 92 N.E.2d 761, constitutional issues which have been determined on the merits by this court are not available upon a post-conviction hearing.
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> . . .
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> "If the trial court finds, on hearing, that petitioners had counsel of their own choosing or competent counsel appointed by the court and that they were not prevented from asserting their claims, the claims have been waived and that will be the end of the matter so far as the trial court is concerned. The claims will also have been waived unless the trial court finds that petitioners were prevented by their indigence from obtaining a review by writ of error accompanied by a bill of exceptions."
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> 102 N.E.2d 824, 826, 827

As pointed out earlier in this brief, appellants were represented by counsel at their trial[139] and the claim that their confessions were coerced was in fact asserted[140] and pressed upon appeal to the Supreme Court of Hawaii and further to this Court.

Certainly there was no denial of fundamental fairness that would warrant further litigation of the same issue. *Smith* v. *United States*, 187 F.2d 192. If

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[139]Ans. Br. pp. 13-14 [140]Ans. Br. pp. 19-21

criminal justice is to be administered there must be a reasonable end to litigation.

The question of the scope of the remedy under territorial law is obviously a question of local law. It does not raise a federal question, as was recognized by the Supreme Court in *Jennings* v. *Illinois*, 342 U.S. 104, where it was left to the courts of Illinois to make a final determination of the extent of relief available under the Illinois Post Conviction Hearing Act. The reason is that the scope of habeas corpus relief is a procedural question separate and apart from the question of whether constitutional rights were infringed at the prisoner's trial.

It is submitted that the ruling of the Supreme Court of Hawaii limiting the scope of the writ in this jurisdiction is practically conclusive. On a point so well supported by federal cases, including decisions of this Court, it is unthinkable that the Supreme Court of Hawaii would be overruled by this Court. *Waialua Co.* v. *Christian*, 305 U.S. 91; *Pioneer Mill Co.* v. *Victoria Ward*, 158 F.2d 122 (CA 9th), cert. denied 330 U.S. 838; *Meyer* v. *Territory of Hawaii*, 164 F.2d 845 (CA 9th), cert. denied 333 U.S. 860; *Palakiko* v. *Territory of Hawaii*, 188 F.2d 54 (CA 9th).

II

THE COURT BELOW HAVING FOUND AFTER HEARING AND ON SUBSTANTIAL EVIDENCE THAT THE CONFESSIONS WERE IN FACT MADE VOLUNTARILY, THIS COURT SHOULD NOT SET ASIDE THE FINDING.

As pointed out in the preceding portion of this brief (page 19), the rule limiting the scope of habeas

corpus was not adopted until after the close of the hearing. This is not a case where relief was denied without a hearing on the facts. There was indeed a very lengthy hearing, in which appellants were afforded every opportunity to prove that their confessions were involuntary.

A. Palakiko's confession.

The testimony bearing on the question of coercion as to Palakiko's confession is summarized in the statement of the case, pages 6 to 10 of this brief.

In support of the contention that his confession was coerced, Palakiko testified that both Detective King and Detective Stevens struck him before he confessed.[141] King resigned from the department and left the Territory before the murder trial and was not available at either the murder trial or the habeas corpus proceeding.[142] Stevens testified in the criminal trial but later resigned from the department and left the Territory and was not available at the time of the habeas corpus hearing.[143]

Palakiko's testimony that King struck him was directly contradicted by Detective Schneider, who testified that he was with King when King saw Palakiko, that King was never alone with Palakiko and that neither he nor King coerced Palakiko in any manner.[144] Also, in his testimony at the murder trial, which was incorporated as part of the evidence in this case, Stevens flatly denied striking Palakiko or coercing him in any manner.[145].

However, there was more to the matter than a mere

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[141]App. pp. 121, 132, n. 39, 47
[142]App. p. 324
[143]App. p. 325
[144]App. p. 326
[145]App. p. 328

assertion by one witness and a denial by another. Testimony was given by Palakiko's mother, two aunts and a sister, all of whom testified that they saw him on March 22nd, two days after he was allegedly beaten.[146] Prior to the hearing, Palakiko and his relatives filed affidavits in which they stated that Palakiko's face was bruised and swollen and that he had a plaster on his forehead, a bloody cut over his left eye and a cut on his left cheek, but none of them mentioned a wound over his right eye.[147]

Before Palakiko and his relatives testified, several photographs taken of him a few hours after the alleged beating were introduced into evidence by appellants.[148] These photographs clearly show that Palakiko did not have any kind of an injury over his left eye. The only mark which appears in the photographs is one over his right eye.

When confronted with the photographs and their affidavits on cross-examination, Palakiko's relatives became understandably confused and vague in regard to the existence, number and location of the alleged wounds on Palakiko's face.[149] However, Palakiko was positive in his testimony that he received a cut over his left eye that bled for several hours[150] and that he also had a cut over his right eye,[151] but admitted that he did not know of the existence of the cut over his right eye until he saw his picture in a newspaper sometime after the alleged beating.[152]

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[146]App. pp. 204, 205, 207, n. 72, 73, 74

[147]App. pp. 7, 52, 62, 64, 65, 67

[148]Pet. Ex. 7, 8, 9, 10, 11, 12

[149]App. p. 134, n. 50

[150]App. pp. 124, 125, n. 43, 44

[151]App. pp. 128, 129, n. 45, 46

[152]App. p. 129, n. 46

None of the twelve police officers, two prison guards, two newspaper photographers, a newspaper reporter or the acting public prosecutor who saw Palakiko shortly after the alleged beating noticed or saw any cuts, bruises or anything unusual about Palakiko's face,[153] except Captain Kennedy of the police and Mr. Ebert, a newspaper photographer. Kennedy recalled that he noticed the mark over Palakiko's right eye when Palakiko arrived at the police station prior to the alleged beating. He described the mark as a "scar".[154] Mr. Ebert, a former clinical photographer for the Harvard Medical School, testified that he noticed the mark over Palakiko's right eye on the evening of March 20, 1948, after the alleged beating, which he described as an old injury that was "healing".[155]

Confronted with this conflict in the evidence as to whether or not Palakiko was subjected to violence and coercion the Supreme Court determined the facts to be that Palakiko was not subjected to any force, coercion or violence.[156]

B. Majors' confessions.

Majors also claimed coercion by Detective Stevens, who questioned Majors on the first and second of the three occasions that he made a recorded statement to the police. The circumstances surrounding the three statements are related in the statement of the case at pages 10 to 13 and will not be repeated here. More particularly on the charge of coercion, Majors

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[153]App. pp. 172, 190, 192, n. 61, 63, 64

[154]App. p. 188, n. 62

[155]App. p. 192, n. 64

[156]39 Haw. 167, 176, 178

testified that he told Stevens he was sick, his throat hurt and he didn't want to answer questions;[157] that it seemed to him that Stevens was there all the time;[158] and that Stevens told him: (a) ". . . I might as well tell him everything because I was going to die anyway";[159] (b) ". . . when I got out of the hospital he would like to get me in a room";[160] (c) ". . . I might as well confess now since Palakiko implicated me . . .", and (after showing him a newspaper story of Palakiko's confession) ". . . you going to be charged whether you say it or not";[161] and that (d) ". . . if I tell everything, it be easy for me."[162] Majors admitted, however, that he was at no time subjected to violence.[163]

In the criminal trial Majors' attorneys attacked the admissibility of his statements on practically the same grounds. Although Majors did not testify in the criminal trial, his third statement contained practically the same charges and furnished the basis for a rigorous cross-examination of Detective Stevens,[164] who did testify at the trial. The trial court also questioned Stevens closely on the question of coercion.[165] Stevens' testimony in regard to the voluntariness of Majors' confessions at Queen's Hospital was in summary as follows: That he questioned Majors on three occasions, first, at 2:55 a.m. on March 21, 1948, for about an hour, at which time no recorded statement was taken; second, from about 10:15 the same morning to 11:30 a.m., at which time a recorded statement

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[157]App. p. 330
[158]App. p. 331
[159]App. p. 331
[160]App. p. 247, n. 107
[161]App. p. 247, n. 107
[162]App. p. 247, n. 107
[163]App. p. 246, n. 105
[164]App. p. 332, n. 166
[165]App. p. 332, n. 166

was taken; and third and last, on March 22, 1948, from 1:45 p.m. to 3:17 p.m., when a second recorded statement was taken; that Majors did not ask to be left alone or tell him that he didn't want to talk, but on the contrary Majors was cooperative; and that he did not at any time subject Majors to violence or threats of violence, or offer any reward or promise immunity to Majors. Stevens specifically denied telling Majors that "it would go easy with him if he came out and talked", that "it would make no difference what he said he would still be charged", or that he would like to take him or get him in a room.[166]

The testimony of two other witnesses, Dr. Rhead of Queen's Hospital and Officer Donlin, is important in connection with Majors' confessions. The testimony of Dr. Rhead, who testified in the criminal trial, showed that Majors was physically and mentally capable of making a statement on the morning of March 21, 1948.[167] The testimony in the habeas corpus proceeding of Officer Donlin that Majors on March 21, 1948 told Dr. Darrow, also of Queen's Hospital, in his presence the details of the attack on Mrs. Wilder clearly indicates Majors' willingness and ability to confess.[168]

It might be noted at this point that this Court in *Palakiko* v. *Territory of Hawaii*, 188 F.2d 54 (CA 9th), found no objection to informing a prisoner that he would be charged whether he said "yes" or "no" or to inform a prisoner that "if he speaks it will be easier for him".

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[166]App. p. 332

[167]App. p. 222, n. 87

[168]App. pp. 224, 226, n. 88, 89

In regard to Majors' testimony that Stevens told him he might as well tell him everything because he was going to die, it is clear that such a statement does not invalidate a confession. As the influence of religious considerations makes for truth in a confession and not against it, confessions given under such influence are held to be admissible. 3 Wigmore, Evidence, § 840, (3d Ed.).

The fact that Majors was shown a newspaper report of his accomplice's confession does not render Majors' confessions involuntary even though it might have been done to induce Majors to confess. Confessions are admissible even though induced by false reports of an accomplice's confession. 3 Wigmore, Evidence, § 841, (3d Ed.). Even a confession obtained by fraud or trick is held to be admissible unless the fraud or trick is such as would tend to produce a false statement. 3 Wigmore, Evidence, § 841, (3d Ed.).

Besides the two confessions to Stevens, Majors gave the police a third confession on March 24, 1948. As to this confession, Majors testified that he asked an officer to call Captain Straus and to give him a message, "That I wanted to see Captain Straus, to take me out of the hospital" "So I can give him my own story",[169] "a straight story".[170] Majors asserts two reasons for making the third confession. First, he claimed that he gave Straus the third confession to avoid being beaten up;[171] yet he had already given two statements to Stevens and Stevens had reminded

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[169]App. p. 236, n. 96
[170]App. p. 338
[171]App. p. 338

him of these statements.[172] Second, he said that he didn't know if what he had told Stevens was right or wrong and wanted to tell Straus the truth.[173] The only apparent reason for making the third confession was that he might include self-serving declarations repudiating his previous confession of raping Mrs. Wilder.

Majors explains his signing the confession of March 24, by his testimony that he didn't read his confession[174] and signed it only because Detective Edmondston told him he would be charged with second degree murder.[175] Edmondston denied making any such promise or assertion to Majors.[176] Majors' denial of reading the confession is inconsistent with his admission that he made corrections on pages 2, 12, 24 and 28 of the confession.[177]

The Supreme Court concluded as to Majors' testimony regarding his confessions that ". . . the testimony of Majors on the issues of coerced confessions is not credible . . ." *Application of Palakiko and Majors*, 39 Haw. 167, 177.

The appellants in their opening brief (pages 89-90) urge that the testimony of Captain Kennedy completely confirms Majors' description of how his statements were obtained. Captain Kennedy when being questioned by the appellants' attorney was shown a newspaper and was asked if he made the statement contained in an article there. Kennedy said that offhand it appeared to be the gist of what was released

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[172]App. p. 338, n. 170, 173

[173]App. p. 338, see also n. 98, p. 238

[174]App. p. 339

[175]App. p. 250, n. 108

[176]App. p. 251, n. 109

[177]App. p. 241, n. 102

over Saturday and Sunday (March 20 and 21, 1948). When asked if the statements in the article appeared to be the ones he made and to be true Kennedy replied, "that is correct".[178] The newspaper article referred to in the questioning reported that detectives questioned Majors from 3:00 a.m. to 6:30 a.m. on March 21, 1948, that Majors was not given a sedative until 6:30 a.m. and that detectives were working in relays.[179] The statements in this article are clearly erroneous. The hospital records, Pet. Ex. 3, p. 10, Sleep Chart and Sheet 1 of the Nurse's Record, p. 14 of the same exhibit, show that Majors was given sodium luminal (phenobarbital) at 4:30 a.m., and that he went to sleep long before 6:30 a.m.[180]

C. Effect of findings by court below.

The Supreme Court of Hawaii examined Palakiko's face, observed the demeanor of the witnesses, determined the credibility of the witnesses, and after weighing the evidence, found the facts to be that the testimony of Palakiko and Majors was not credible, that Detectives King and Stevens did not strike, threaten or coerce Palakiko and that Stevens did not threaten or coerce Majors.

> "On review of the entire record of hearing and trial, this court further finds that there was no force, violence, duress, threats, misrepresentations or promises of immunity or reward made to obtain the confessions of either Palakiko or Majors and *a fortiori* no concealment thereof at the trial. It also finds that the confessions were made voluntarily consonant to constitutional

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[178]App. p. 340

[179]Pet. Ex. 6, *Honolulu Advertiser*, March 22, 1948, p. 4

[180]App. p. 342

guarantees. Nor is there any indication that the testimony, on which the confessions were determined to be voluntary at the trial, is perjured and discovered to be such after trial so as not to have been open to consideration or reviewed on appeal. On the contrary, the hearing conclusively establishes such trial testimony to be credible, substantial and sufficient to warrant the admission of the confessions into evidence as the basis for conviction as determined on appellate review."

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This Court when considering a case involving questions of due process from the Supreme Court of Hawaii examines the record in like manner as the Supreme Court of the United States when reviewing judgments of state courts. *Palakiko* v. *Territory*, 188 F.2d 54, 56 (CA 9th).

The rule on such review is stated in *Watts* v. *Indiana*, 338 U.S. 49, as follows:

"On review here of State convictions, all those matters which are usually termed issues of fact are for conclusive determination by the State courts and are not open for reconsideration by this Court. . . .

"In the application of so embracing a constitutional concept as 'due process,' it would be idle to expect at all times unanimity of views. Nevertheless, in all the cases that have come here during the last decade from the courts of the various States in which it was claimed that the admission of coerced confessions vitiated convictions for murder, there has been complete agreement that any conflict in testimony as to what actually led to a contested confession is not this Court's concern. Such conflict comes here authoritatively resolved by the State's adjudication. Therefore

> only those elements of the events and circumstances in which a confession was involved that are unquestioned in the State's version of what happened are relevent to the constitutional issue here. . . ."
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> 338 U.S. 49, 50, 51-52

At the very least, findings of fact by the Supreme Court of Hawaii supported by evidence will not be overturned by this Court in the absence of manifest error. *Waialua Co.* v. *Christian*, 305 U.S. 91; *Reyes* v. *La Capital De Puerto Rico*, 106 F.2d 199 (CA 1st); *Ramu* v. *Succession of Verges*, 42 F.2d 976 (CA 1st); *Pioneer Mill Co.* v. *Victoria Ward*, 158 F.2d 122 (CA 9th), cert. denied 330 U.S. 838.

If the findings of the court below would not be set aside even upon direct attack on the judgment in the criminal case, then certainly they shouldn't be disturbed upon a collateral attack in a habeas corpus proceeding.

III

THE MCNABB RULE IS INAPPLICABLE AS A MATTER OF LAW AS WELL AS OF FACT.

The appellants further contend that regardless of whether or not there was coercion in fact, their confessions were inadmissible because they were obtained under circumstances which rendered them involuntary as a matter of law, citing the rule of the *McNabb* case, *McNabb* v. *United States*, 318 U.S. 332.

The *McNabb* rule, as laid out in *McNabb* v. *United States*, 318 U.S. 332, *United States* v. *Mitchell*, 322 U.S. 65 and *Upshaw* v. *United States*, 335 U.S. 410, is to the effect that a confession made during a period of detention which is in violation of the federal statute

requiring that prisoners be taken promptly before a committing magistrate is inadmissible, regardless of whether or not the confession was the result of actual coercion. Adopted under the power of the Supreme Court to establish rules determining the admissibility of evidence in federal criminal cases and Rule 5 of the Federal Rules of Criminal Procedure, it is simply a federal rule of evidence, not a principle of constitutional law, and does not apply to state criminal proceedings. *Gallegos* v. *Nebraska*, 342 U.S. 55.

Federal rules of evidence do not apply to the courts of the Territory of Hawaii. *Palakiko* v. *Territory*, 188 F.2d 54. Hence, the *McNabb* rule is clearly inapplicable in the instant case.

Moreover, even in federal jurisdictions, where the rule applies, it is held that a violation of the rule is not grounds for habeas corpus relief. Thus, in *Smith* v. *United States*, 187 F.2d 192 (CA D.C.), cert. denied 341 U.S. 927, the petitioner had been arrested by the District of Columbia police and unlawfully detained for thirteen days and the statements he had made to the police in the course of questioning during such detention had been used against him in the criminal trial. The court held that though the admission of the evidence had been erroneous, having been contrary to the *McNabb* rule, the convictions could not be collaterally attacked by habeas corpus, and stated:

> "When, as in Bowen v. Johnston, supra, it is said that there has been a denial of 'constitutional rights,' (see, to similar effect, Smith v. O'Grady, supra), the whole course of events is to be considered, not merely the erroneous admission of evidence claimed to infringe a right protected by the Constitution. Such admission alone does

not result in the denial of a constitutional guaranty so long as the error is subject to correction on appeal and there is no indication of any deterrent to appeal, such as lack of counsel. Accordingly, in such circumstances the method of correction must be direct, not collateral. Otherwise a motion under § 2255 becomes indeed a substitute for the regular judicial process of trial and review. Where, however, the denial of constitutional right persists, through lack of counsel or perjury undiscovered, or mob domination which saps all substance from the trial, or there is lack of jurisdiction or some other fundamental weakness in the judicial process which has resulted in the conviction, collateral attack is at hand, now under § 2255. For, ordinarily, appeal would be ineffective to preserve the right denied. This is not the situation in the case at bar. Appellant had full opportunity to attack on his trial the evidence now challenged and to appeal on the basis of its erroneous admission if he so desired."

187 F.2d 192, 197-198

Even if it is assumed that the *McNabb* rule applies in this jurisdiction, it will be found that there was no violation of the rule. It will be recalled that both appellants were recaptured convicts at the time they were questioned and their confessions obtained.[181] It is absurd to talk of "illegal detention" of escaped convicts. A similar situation was covered in *United States* v. *Carignan*, 342 U.S. 36, where the Court declined to extend the *McNabb* rule to statements concerning other crimes made by prisoners who are legally under detention on criminal charges.

It is respectfully submitted that appellants' reliance on the *McNabb* rule is entirely without substance.

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[181] App. pp. 73, 31, 74, n. 6, 7, 8

IV

THE APPELLANTS HAD THE ASSISTANCE OF COUNSEL AT ALL STAGES OF THE PROCEEDINGS AT WHICH THEY WERE CONSTITUTIONALLY ENTITLED TO SUCH ASSISTANCE.

Appellants contend (Op. Br. pp. 159-160) that they were deprived of their constitutional right to assistance of counsel (1) because they did not have the assistance of counsel while under investigation by the police, (2) because they were not accorded a preliminary hearing, and (3) because their counsel did not have adequate time to consult and prepare for trial.

The Sixth Amendment to the United States Constitution provides that "*In all criminal prosecutions*, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." (Emphasis added) It was said in *Powell* v. *Alabama*, 287 U.S. 45 at page 69, that a defendant ". . . requires the guiding hand of counsel at every step in the proceedings against him." The basic doctrine of the *Powell* case, however, was that counsel must have time prior to trial to prepare the defense; the broad language of the opinion must be considered in the light of later decisions. Thus, it is held that the Sixth Amendment does not require that the accused be represented by counsel on arraignment if he pleads not guilty, as the absence of counsel at such time could not prejudice the defendant. *Council* v. *Clemmer*, 177 F.2d 22 (CA D.C.), cert. denied 338 U.S. 880; *Wilfong* v. *Johnston*, 156 F.2d 507 (CA 9th). Even if the accused pleads guilty, the lack of counsel at arraignment is not prejudicial if counsel is afterwards appointed and an opportu-

nity is had to withdraw the plea. *Council* v. *Clemmer*, *supra*. Nor is there any constitutional requirement that the accused be represented by counsel at a preliminary hearing. *Burall* v. *Johnston*, 146 F.2d 230 (CA 9th), cert. denied 325 U.S. 887; *Price* v. *Johnston*, 144 F.2d 260 (CA 9th), cert. denied 323 U.S. 789. Moreover, a preliminary hearing is not a *criminal prosecution* within the meaning of the Sixth Amendment. *Burall* v. *Johnston*, *supra*; *Garrison* v. *Johnson*, 104 F.2d 128 (CA 9th), cert. denied 308 U.S. 553; *Council* v. *Clemmer*, *supra*. *Wood* v. *United States*, 128 F.2d 265 (CA D.C.), cited in the opening brief at page 157, is not to the contrary; it merely held that a plea of guilty, made at a preliminary hearing where the defendant did not have assistance of counsel, is not admissible in evidence against the defendant in the trial.

An investigation by the police is certainly not a *criminal prosecution* within the meaning of the Sixth Amendment. Therefore, the claim that appellants' constitutional right to assistance of counsel was infringed because they were not provided with counsel before they confessed is without merit. Whether an accused consults with counsel prior to making a confession is merely one of the factors which may be considered in determining the voluntariness or admissibility of a confession, and it is generally held that the fact that a defendant did not have the advice of counsel prior to making a confession does not affect the admissibility of his confession. *Wilson* v. *United States*, 162 U.S. 613; *State* v. *Bunk*, 4 N.J. 461, 73 A.2d 249; *State* v. *Hofer*, 238 Iowa 820, 28 N.W. 2d 475; *State* v. *Watson*, 114 Vt. 543, 49 A.2d 174; *State* v. *Tillett*, 233 S.W.2d 690 (unreported in Mo.

rpts.); *State* v. *Henderson*, 182 Ore. 147, 184 P.2d 392; *Territory* v. *Chung Nung*, 21 Haw. 214. See also *Gallegos* v. *Nebraska*, 342 U.S. 55.

The contention that appellants were denied their constitutional right to assistance of counsel because they did not have a preliminary hearing is likewise without merit. There is no constitutional right to a preliminary hearing. *Burall* v. *Johnston*, 146 F. 2d 230 (CA 9th), cert. denied 325 U.S. 887; *Council* v. *Clemmer*, 177 F.2d 22 (CA D.C.), cert. denied 338 U.S. 880; *Garrison* v. *Johnston*, 104 F.2d 128 (CA 9th), cert. denied 308 U.S. 553. In *Burall* v. *Johnston*, this court said:

> "The appellant states that he was taken before the Commissioner after his arrest, that 'petitioner then demanded counsel to represent him, but instead of counsel he was told to plead; he plead not guilty, he was remanded to jail.' He herein insists that he was entitled to have counsel assigned to assist him in the hearing before the Commissioner without cost, and he now contends that because of this the court had no jurisdiction to try him upon the indictment subsquently returned.
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> "The preliminary hearing is not a trial within the meaning of the Constitution but is an ex parte proceeding. In fact, this court has held that the accused is not entitled to the issuance of a writ because he had no preliminary examination. Garrison v. Johnston, 9 Cir., 104 F.2d 128, 130. See also Clarke v. Huff, 73 App. D.C., 351, 119 F. 2d 204.
>
> 146 F.2d 230

Neither appellants nor their counsel, who were retained by relatives soon after their arrest, made any request for a preliminary hearing. Regardless of what

would have been shown in a preliminary hearing, appellants were, of course, not eligible to be released, for they were serving prison sentences.

As to the contention that their former counsel did not have sufficient opportunity to prepare the defense —as a matter of fact, appellants' relatives retained counsel for them early in April, 1948, about two months prior to the trial.[182] The attorneys so selected visited the prisoners at Oahu Prison on at least three occasions, the first on April 8, 1948.[183] Besides the consultations at Oahu Prison, opportunity for further consultation with counsel was had on May 7, 1948, when the appellants were arraigned, and on June 3, 1948, when the trial court formally appointed the previously retained counsel, and on the same day a plea of "not guilty" was entered and the case set for trial on June 7, 1948 without objection.[184] On the day set for trial, the attorneys for the defense appeared and answered that they were ready for trial.[185] Throughout the trial in the circuit court, on appeal to the Supreme Court of Hawaii and finally on appeal to this Court, the appellants were represented by the same three attorneys,[186] who the appellants admitted were competent and that their competency was not in issue.[187] It is, therefore, clear that there was no denial of the right to assistance of counsel.

The following quotation from *Wilfong* v. *Johnston*, 156 F.2d 507 (CA 9th), where consultation on "at

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[182]App. pp. 275, 280, n. 110, 111

[183]App. p. 282, n. 113

[184]App. pp. 284, 285, n. 114, 115

[185]App. p. 286, n. 116

[186]39 Haw. 167, 170, 180-181

[187]App. p. 287, n. 117

least two occasions" prior to trial was found to be sufficient, is appropriate in this connection:

> "We find no merit in the contention of petitioner that he was moved to another district during the pendency of his trial for the reason that he had opportunity to consult with counsel during that time and we fail to discern wherein he was thereby prejudiced in any manner, nor did the failure to permit petitioner to be represented by counsel at the time of arraignment result in prejudice to him. While it is true that one charged with crime 'requires the guiding hand of counsel at every stage in the proceedings against him' and where such failure occurs it will be carefully scrutinized, yet the fundamental purpose of the law in requiring such assistance is to insure against the prejudicing and hampering a defendant in his defense of a charge against him. Such careful scrutiny is especially necessary where a plea of guilty is entered. In the instant proceeding the situation is quite different; a plea of not guilty was entered for the defendant; before trial he secured counsel of his own choice, had an opportunity to confer with such counsel, and before trial additional counsel was secured with whom it must be assumed petitioner also had opportunity to confer. . . ."
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> 156 F.2d 507, 508-509

Furthermore, there is no evidence that counsel would have been able to defend the appellants more effectively had they consulted with them on more occasions, or had they asked for more time to prepare the defense.[188] In the absence of such evidence it cannot possibly be said that effective assistance of counsel was denied. *United States* v. *Wight*, 176 F.2d 376 (CA 2d); *State* v. *Zied*, 116 N.J.L. 234, 183 Atl. 210.

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[188]39 Haw. 167, 178

Although the appellants do not directly allege it, they argue by innuendo that their former defense counsel were incompetent, in that they did not know that the appellants could have testified in the murder trial solely on the issue of the voluntariness of the confessions[189] and in that counsel did not attack the confessions except by cross-examination.[190] The charge is entirely unwarranted and it is entirely inconsistent with the admission of their competency. On the contrary, the Supreme Court of Hawaii stated:

> "...They [defense counsel] followed a course of procedure at the trial, which they determined to be for the best interests of the defense of Palakiko and Majors, by not placing either one of them on the witness stand. Nor can it be said with reason that they did not act wisely in the light of the character of testimony given by Palakiko and Majors at the instant hearing. . . ."
>
> *Application of Palakiko and Majors*, 39 Haw. 167, 181

V

THERE WAS NO MOB DOMINATION OR ANY OTHER INTERFERENCE WITH APPELLANTS' TRIAL SUCH AS TO CONSTITUTE A DENIAL OF THE RIGHT TO A FAIR TRIAL.

In *Frank* v. *Mangum*, 237 U.S. 309, 335, the Supreme Court stated that "... if a trial is in fact dominated by a mob, so that the jury is intimidated and the trial judge yields, and so that there is an actual interference with the course of justice, there is, in that court, a departure from due process of law in the proper sense of that term. And if the State, supplying no

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[189]Appellants' Op. Br. p. 160

[190]Appellants' Op. Br. p. 160

corrective process, carries into execution a judgment of death or imprisonment based upon a verdict thus produced by mob domination, the State deprives the accused of his life or liberty without due process of law."

Then, in *Moore* v. *Dempsey*, 261 U.S. 86, the Court held that habeas corpus relief would lie on the following facts: After the petitioners, negroes, were arrested for the murder of a white man, a mob marched on the jail to lynch them. The mob was stopped only by United States troops. Witnesses were whipped and tortured until they promised to say what was wanted. The petitioners were brought into court for trial, informed that a certain lawyer was appointed their counsel and placed on trial before an all-white jury. The courthouse and vicinity were thronged with an adverse crowd that threatened the most dangerous consequences to anyone interfering with the desired result. Counsel did not venture to demand a delay or change of venue, or challenge any juryman or ask for separate trials for the defendants. He had had no preliminary consultation with the accused, called no witnesses for the defense although they could have been produced, and did not put the defendants on the stand. The trial lasted about three quarters of an hour and in less than five minutes the jury brought in a verdict of guilty of murder in the first degree. According to the allegations and affidavits there never was a chance for the petitioners to be acquitted; no juryman could have voted for an acquittal and continued to live in the county; and if any prisoner by any chance had been acquitted by jury, he would not have escaped the mob. It was not surprising that the Court found that there was a denial of due process.

Similarly, in Mr. Justice Jackson's concurring opinion in *Shepherd* v. *Florida*, 341 U.S. 50, he found a fair trial to have been denied where newspapers had reported that the defendants had confessed to murder, but no confessions were offered in evidence at the trial. There were other circumstances, however, including the following: A mob had gathered at the jail and demanded that the defendants be turned over to them; other mobs had burned negroes' homes; the National Guard had been called out; negroes fled the community; motions for a continuance and change of venue had been denied; and extreme precautions had been required to protect the defendants during the trial.

On the other hand, in *Stroble* v. *California*, 343 U.S. 181, a case recently before the Supreme Court upon appeal in the criminal case, the Court reached the opposite result. The case involved an exceptionally atrocious "sex murder" of a six-year-old girl. The defendant was arrested on November 17, 1949, three days after the murder, and trial was commenced on January 3, 1950. The defendant contended that newspaper accounts of his arrest and confession had been so inflammatory that he was denied a fair trial. There had indeed been considerable sensationalism in the publicity regarding the crime. Considerable publicity was given to the search for and apprehension of the murderer; there were banner headlines regarding the "manhunt"; defendant's confession was reported in detail; and the defendant was described in the newspapers as a "werewolf", "fiend" and "sex-mad killer". The district attorney announced to the press that he believed the defendant to be guilty. A special session of the legislature was called to consider in part "sex crimes". In the hearings before the legis-

lature the district attorney stated that sex offenders should be disposed of the same way as mad dogs. There were conferences of law enforcement committees, and various citizens' groups made proposals. On these facts the Court found that the defendant was not denied a fair trial, stating:

> "...Indeed, at no stage of the proceedings has petitioner offered so much as an affidavit to prove that any juror was in fact prejudiced by the newspaper stories. ...and there is no affirmative showing that any community prejudice ever existed or in any way affected the deliberation of the jury. It is also significant that in this case the confession which was one of the most prominent features of the newspaper accounts was made voluntarily and was introduced in evidence at the trial itself."
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> 343 U.S. 181, 195

Also, in *Carruthers* v. *Reed*, 102 F.2d 933 (CA 8th), cert. denied 307 U.S. 643, after an extensive review of the circumstances which indicated considerable excitement in the community, the court found there was no mob domination.

As shown by the review of the circumstances in this case at pages 14 to 16 of this brief, the facts of the instant case are far removed from those in *Moore* v. *Dempsey* and *Shepherd* v. *Florida*. There was not the slightest evidence of any mob behavior. Nor was there any evidence that any juror or witness or that the judge was in any way prejudiced, intimidated or influenced by newspaper accounts or otherwise.

It is submitted that the conclusion of the court below was entirely in accord with the evidence:

> "...Most of this comment [newspaper], however, was directed against the crime itself and

the laxity of prison officials in allowing dangerous prisoners the opportunity of escape. . . . there is no evidence that it [newspaper articles] so aroused public feeling against the defendants that a change of venue became necessary or had the effect of intimidating or prejudicing any witness or juror at the trial. The *voir dire* was conducted by counsel, under supervision of the trial judge, in full exercise of statutory rights of examination and challenge for cause and of peremptory challenge. Three panels, totaling more than a hundred men, were exhausted. . . . The trial patently was conducted in a calm and judicial atmosphere and in a circumspect and orderly manner. Nor was there any sign, threat or fear of mob violence or any suggestion of mob spirit within the community. Indeed no semblance of a mob existed from the time of murder to the end of trial, or at any time, and no other influence that in any way impaired the securing of a fair and impartial trial, or that in any way affected the prosecuting authorities, the grand and petit juries, and the defense attorneys in carrying out their duties, or prevented a full and proper presentation of any defense."

Application of Palakiko and Majors, 39 Haw. 167, 179-180

VI

APPELLANTS' ATTACK ON THE CONSTITUTIONALITY OF THE MURDER STATUTE IS NOT WELL TAKEN.

Section 11390, Revised Laws of Hawaii 1945, defines the crime of murder in common law terms and provides that it shall be of two degrees, first and second, which shall be found by the jury. Section 11392, Revised Laws of Hawaii 1945, provides that a murder committed (a) "with deliberate premedi-

tated malice aforethought," or (b) "in the commission of or attempt to commit any crime punishable with death," or (c) "with extreme atrocity or cruelty," is murder in the first degree. Only the phrase "murder . . . committed with extreme atrocity or cruelty" has been brought into question in the case. This provision has been part of the statutory law of the Territory since 1890 (L. 1890, c. 72, § 2a), apparently adopted from the State of Massachusetts, which has had an identical statute since 1858. (Laws of Mass. 1858, c. 154, §§ 1-3) The validity of this provision has never been previously questioned in either jurisdiction, but the phrase has been discussed or defined in the following cases: *Republic of Hawaii* v. *Yamane*, 12 Haw. 189; *Commonwealth* v. *Desmarteau*, 82 Mass. 1; *Commonwealth* v. *Delvin*, 126 Mass. 253; *Commonwealth* v. *Gilbert*, 165 Mass. 45, 42 N.E. 336; *Commonwealth* v. *Feci*, 235 Mass. 562, 127 N.E. 602; *Commonwealth* v. *McGarty*, 323 Mass. 435, 82 N.E.2d 603.

Due process of law requires that the language of a penal statute must be sufficiently explicit so as to inform those who are subject to it what conduct on their part will render them liable to its penalties. *Connally* v. *General Const. Co.*, 269 U.S. 385. The essential purpose of the "void for vagueness" doctrine is to warn individuals of the criminal consequences of their conduct. *Williams* v. *United States*, 341 U.S. 97. Difficulty in determining whether certain marginal offenses are within the meaning of the language under attack for vagueness does not necessarily render a statute unconstitutional for indefiniteness. *United States* v. *Wurzbach*, 280 U.S. 396. Impossible

standards of specificity are not required. *United States* v. *Petrillo*, 332 U.S. 1.

In *Jordan* v. *De George*, 341 U.S. 223, the validity of a statute using the term "crime involving moral turpitude" was questioned. In finding this clause to be valid the Court said:

> "It is significant that the phrase has been part of the immigration laws for more than sixty years. . . . the phrase 'crime involving moral turpitude' has also been used for many years as a criterion in a variety of other statutes. No case has been decided holding that the phrase is vague, nor are we able to find any trace of judicial expression which hints that the phrase is so meaningless as to be a deprivation of due process."
> 341 U.S. 223, 229-230

The same can well be said of the phrase "murder . . . committed with extreme atrocity or cruelty", which the court below found to meet due process requirements of certainty. *Application of Palakiko and Majors*, 39 Haw. 141.

But even if the phrase is unconstitutional, it does not follow that the appellants are entitled to habeas corpus relief.

The judgment in the murder case was based on a general verdict of guilty on three counts,[191] each of which charged murder in the first degree under section 11392, Revised Laws of Hawaii 1945. Only one of the three counts was predicated on the questioned phrase. Even if it is assumed that the provision in question is unconstitutional for vagueness, it does not follow that the judgment itself is void. On a collateral

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[191]App. p. 345, see also app. p. 19

attack by way of habeas corpus, the judgment is presumed to be valid. The conviction cannot be set aside unless the appellants can prove that the conviction rested on the invalid, and not on the valid, part of the statute. *Ex Parte Bell*, 19 Calif.2d 488, 122 P.2d 22. That appellants have failed to do.

VII

THE ATTACKS ON THE VALIDITY OF THE VERDICT OF THE JURY ARE LIKEWISE WITHOUT MERIT.

Appellants contend that the general verdict of "guilty as charged" was void because the first and second of the three counts, namely, (1) murder while committing the crime of rape, (2) murder while attempting to commit the crime of rape, and (3) murder committed with extreme atrocity or cruelty, each charging murder in the first degree,[192] are mutually exclusive, and that, therefore, the jury could not have found appellants guilty on both of the first two counts.

This contention is clearly untenable, as the statute does not create distinct offenses of murder in the first degree but only one offense, which may be committed by any of the several ways specified in the statute and for which the penalty is the same. *Republic of Hawaii* v. *Yamane*, 12 Haw. 189, 201. Since each of the three counts charged murder in the first degree, for which the penalty is the same, it would seem to make no difference on which of the counts the verdict was predicated. *Johnson* v. *United States*, 215 Fed. 679, cited by the appellants in their

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[192]App. p. 19

opening brief at page 164, is not to the contrary. In the *Johnson* case the court stated at page 687, "If one criminal act is charged in several ways, one good count, supported by competent evidence, will sustain a general verdict of guilty."

Appellants further attack the verdict on the ground that the second count does not charge murder in the first degree, but murder in the second degree. More specifically, the appellants contend (Op. Br. p. 131) that the second count of the indictment charges not murder in the first degree but murder in the second degree because it alleges a murder in the attempt to commit assault with intent to rape, as distinguished from a murder in the attempt to commit rape.

This contention is absurd on its face. Murder in the first degree is defined in section 11392, Revised Laws of Hawaii 1945, to include "murder committed . . . in the . . . attempt to commit any crime punishable with death". Section 11678, Revised Laws of Hawaii 1945, provides that the punishment for rape shall be ". . . death or . . . imprisoned at hard labor for life or any number of years". The second count clearly charges that the appellants murdered Mrs. Wilder in the attempt to commit the crime of rape, not, as contended by appellants, in the attempt to commit the crime of assault with intent to rape.[193]

Finally, the appellants attack the verdict on the ground that there was insufficient evidence to support it.

The court below held that it would not inquire into the sufficiency of the evidence upon which appellants

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[193]App. p. 20

were convicted.[194] The decision is in accord with the line of cases holding that habeas corpus cannot be used to inquire into the sufficiency of the evidence upon which a prisoner was convicted. *Sunal* v. *Large*, 332 U.S. 174; *Eagles* v. *Samuels*, 329 U.S. 304; *Harlan* v. *McGourin*, 218 U.S. 442; and *Crossley* v. *California*, 168 U.S. 640.

It is well established that habeas corpus does not lie to correct errors in criminal cases. Thus, the sufficiency of an indictment under which a defendent was tried and convicted cannot be collaterally attacked in habeas corpus. *Ex Parte Yarbrough*, 110 U.S. 651, 654; *Dimmick* v. *Tompkins*, 194 U.S. 540; *In re Coy*, 127 U.S. 731, 759. Mere error in jury verdicts, even though the error concerns voluntariness of a confession, does not violate due process. *Lyons* v. *Oklahoma*, 322 U.S. 596, 605. Even in a case where the court sentenced a defendant for first degree murder upon a verdict of guilty returned by the jury without specifying the degree of murder as required by statute, which left the determination of the degree of murder to the jury, it was held that the sentence, while erroneous, was not void and was not subject to collateral attack. *In re Eckart*, 166 U.S. 481. See also *Abrams* v. *United States*, 250 U.S. 616 at 619, where upon a direct appeal of a criminal case involving several counts upon which the jury returned a general verdict of guilty, it was held that the sentence must be sustained if it did not exceed the penalty which could have been imposed under any single count and if there was sufficient evidence to sustain any one count.

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[194] 39 Haw. 167, 182

VIII

THE CHARGES THAT PROSECUTING AUTHORITIES SUPPRESSED EVIDENCE FAVORABLE TO THE APPELLANTS IS ENTIRELY WITHOUT SUBSTANCE.

Appellants charge suppression of evidence in two instances, the first of which is that police officers concealed from the court and jury in the murder trial the "fact" that the confessions were involuntary, and more specifically, that police captain Straus concealed the fact that Palakiko had been at the police station from March 12 to March 17, 1948, and that Palakiko had been questioned before he made the recorded statement on March 20, 1948.

While it is true that Straus testified at the trial that as far as he knew Palakiko was kept at Oahu Prison,[195] that he did not know when Palakiko had been first questioned or where these earlier interrogations took place,[196] he stated that Palakiko was questioned prior to his confession[197] and that he had a preliminary conversation with Palakiko prior to the recorded statement.[198] Other police officers testified at the trial that Palakiko was questioned by Detectives King and Schneider on the evening of the 20th, as well as by Straus.[199] In addition, another officer testified that he questioned Palakiko at the police station after arresting him on March 12, 1948.[200] Moreover, Palakiko certainly knew where he had been detained from March 12 to March 20, 1948,

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[195]App. p. 345
[196]App. p. 346
[197]App. p. 346
[198]App. p. 347
[199]App. p. 348
[200]App. p. 350

and whether or not he had been questioned during that period.

If the defense in the criminal trial had desired to show that Palakiko was at the police station from March 12th to March 17th and the exact number of times he had been questioned during this period, they could easily have done so by subpoenaing the records of the police department or of Oahu Prison or by questioning the officers involved. Whether he was detained at the police station or at Oahu Prison certainly didn't make much difference to Palakiko. Apparently the defense did not consider the events of March 12 to 17, 1948, particularly material to the confession of March 20th, 1948, and rightly so, in view of the fact that even Palakiko admits he was not mistreated during this period.[201] *Lyons* v. *Oklahoma*, 322 U.S. 596, and *Lisenba* v. *California*, 314 U.S. 219. It appears that this charge of concealment is merely an effort by present counsel for the appellants to drag in the *McNabb* rule, which has been shown to be inapplicable in part III of this argument.

The second charge of suppression is that a Federal Bureau of Investigation report on an examination of certain garments of Mrs. Wilder showing that they bore no semen stains[202] was suppressed by prosecuting officers. The existence of the report must have been known to defense counsel at the time of the trial, for Detective Cobb-Adams testified that some of Mrs. Wilder's garments had been sent to the Bureau's laboratory for chemical analysis. In fact, counsel objected to the introduction of these garments on the

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[201]App. p. 351 [202]App. p. 351

ground that changes had been made in them after removal from the body.[203]

The report was in the possession of the Prosecutor's office at the time of the trial. Being negative it was not offered in evidence; being hearsay, it would not have been admissible.[204] Certainly the report would not have proved or disapproved a rape or attempted rape. Moreover, it would have been merely cumulative to Dr. Majoska's testimony that he found no spermatozoa in Mrs. Wilder's vagina.[205]

Neither this report nor the facts of Palakiko's detention and questioning at the police station from March 12 to 17, if considered on the grounds of newly discovered evidence, would entitle the appellants to a new trial under Rule 33 of the Federal Rules of Criminal Procedure. See *Brandon* v. *United States*, 190 F.2d 175 (CA 9th), wherein this Court held that a defendant cannot withhold evidence at his trial and on conviction seek a second chance before a new jury. In order to obtain a new trial on newly discovered evidence, this Court in the *Brandon* case found the rule to be as follows:

> ". . . 'There must ordinarily be present and concur five verities, to wit: (a) The evidence must be in fact, newly discovered, i.e., discovered since the trial; (b) facts must be alleged from which the court may infer diligence on the part of the movant; (c) the evidence relied on, must not be merely cumulative or impeaching; (d) it must be material to the issues involved; and (e) it must be such, and of such nature, as that,

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[203]App. p. 352 n. 202, p. 351
[204]App. p. 355, see also [205]App. p. 357

on a new trial, the newly discovered evidence would probably produce an acquittal.'"

In regard to the alleged suppression in the instant case, the court below found:

> "Illustrative of that attempt are the allegations of petition and traverse that the prosecution concealed from the trial court the facts concerning the manner in which the confessions were obtained. But such concealment, if any existed, would be attributable with greater force to Palakiko and Majors, who, at the close of the prosecution's case, rested their case. They did not take the witness stand to give their version of the manner in which the confessions were obtained or contradict the witnesses for the prosecution who gave their version subject to strenuous cross-examination as well as to interrogation by the trial judge. It is evident from the record of trial that the allegations of concealment have no substance and are a mere subterfuge for evading the effect of orderly criminal prosecution and of appellate review. . . .
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> . . .
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> "On review of the entire record of hearing and trial, this court further finds that there was no force, violence, duress, threats, misrepresentations or promises of immunity or reward made to obtain the confessions of either Palakiko or Majors and *a fortiori* no concealment thereof at the trial. . . ."
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> *Application of Palakiko and Majors*, 39 Haw. 167, 173-174, 178

There was no semblance of fundamental unfairness which would entitle the appellants to relief on the ground of suppression of evidence. Certainly there was nothing to bring this case within the rule of

Mooney v. *Holohan*, 294 U.S. 103, where the following allegations were held to make out a case for relief in habeas corpus:

> ". . . the sole basis of his conviction was perjured testimony, which was knowingly used by the prosecuting authorities in order to obtain that conviction, and also that these authorities deliberately suppressed evidence which would have impeached and refuted the testimony thus given against him. He alleges that he could not by reasonable diligence have discovered prior to the denial of his motion for a new trial, and his appeal to the Supreme Court of the State, the evidence which was subsequently developed and which proved the testimony against him to have been perjured. . . ."
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> 294 U.S. 103, 110

Nor is there any resemblance to *United States* v. *Baldi*, 195 F.2d 815, in which the Court of Appeals for the Third Circuit granted relief on the following facts: The prosecuting authorities attempted to show that the defendant in a murder case had fired the fatal shot that killed a police officer, when in fact the prosecutors and police knew that the officer had been shot by mistake by another officer. The defendant and his attorney at the time of trial had no knowledge of this conclusive evidence and its existence was carefully and deliberately concealed from the defendant, his attorney, the court and jury.

If the *Mooney* and *Baldi* cases show what constitutes suppression, *Jordan* v. *Bondy*, 114 F.2d 599 (CA D.C.), shows what is not. There the petitioner asserted that he was entitled to habeas corpus relief because the prosecuting authorities suppressed a police "incidental" and the testimony of certain wit-

nesses. This information was not given to the defendant or his attorney or introduced as evidence. Relief was denied on the ground that the evidence allegedly suppressed was inconclusive, cumulative, in part inadmissible and there was no evidence that the information was in fact suppressed. Regarding the duty of the prosecutor to disclose information, the opinion of the court by Justice Rutledge stated:

> "Appellant's contentions, applied most broadly and especially in the manner sought here, go far beyond these constitutional guaranties and any statutory rights of the accused. In effect they would impose upon the prosecuting officer the duty not only to represent the public, but to represent the accused so far as not only to disclose but to discover evidence which might be considered material to the defense, regardless to some extent of its admissibility, its merely cumulative effect, its equal availability to the accused, and its probable probative effect. Nothing in the Constitution or statutes imposes so broad an obligation. That is true even though it is admitted that the prosecutor not only is not allowed actively to suppress evidence vital to the accused, but is required in certain circumstances to disclose such evidence to him or to the court in order to avoid what would amount in practical effect to concealment. Whether such a disclosure may be required depends of course upon the nature of the evidence, its admissibility and probative value when considered in connection with the other evidence presented in the case.
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> "We think therefore that the charge of suppression of evidence comes to naught; first, because it has not been shown that the alleged evidence would have been helpful to the appellant,

since, directed as it was chiefly toward the issue of his identification as the robber and murderer, it could only have been cumulative to that given by other witnesses and, like theirs, therefore could not have overcome the effect of his confessions; second, because in the respects we have specified it was inadmissible; and, finally, because there is no evidence whatever that the prosecuting officials were guilty of suppressing evidence, either with respect to the police incidental or with reference to oral testimony or other evidence.

"The Constitution literally requires only that the accused 'be confronted with the witnesses against him,' and that mandate was complied with literally at the trial. But if the spirit requires the letter to be construed more broadly, so as to require the prosecutor to disclose, in order not to conceal, evidence which comes to his knowledge prior to the trial and vitally affects the question of guilt or innocence, whether to the court or to the accused or his counsel, there is no violation of either letter or spirit when he merely fails to disclose evidence of which he has no knowledge or fails simply to use or disclose evidence which is only vague, inconclusive and cumulative, as was that in question here. It has been held repeatedly that the prosecution is under no obligation to call all witnesses subpoenaed by the Government, and we now hold that it is no sufficient ground for release by habeas corpus from punishment lawfully imposed that the prosecution either does not discover or does not use as witnesses or disclose the names of persons whose testimony can be only cumulatively corroborative of facts fully proven by other witnesses or evidence. . . ."

114 F.2d 599, 602, 604

As in the *Bondy* case, there was in the instant case no concealment, as all of the facts allegedly concealed were known to the appellants and their attorneys.

IX

THE CHARGE THAT APPELLANTS WERE CONVICTED BY PERJURED TESTIMONY IS NOT ONLY FALSE BUT IRRESPONSIBLE.

Even more insubstantial than the charge of concealment is this charge of perjury. It is undefined, but pervades the whole of the opening brief. Perhaps it is not unreasonable for appellants to urge that testimony in conflict with theirs is perjured—at least, they would be consistent. Yet it is more likely that it is but another of appellants' irresponsible attacks on law enforcement agencies. Suffice it to say that the court below found this contention of the appellants to be false, stating:

> ". . . Nor is there any indication that the testimony, on which the confessions were determined to be voluntary at the trial, is perjured and discovered to be such after trial so as not to have been open to consideration or reviewed on appeal. On the contrary, the hearing conclusively establishes such trial testimony to be credible, substantial and sufficient to warrant the admission of the confessions into evidence as the basis for conviction as determined on appellate review."
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> *Application of Palakiko and Majors*, 39 Haw. 167, 178

X

DEFENSES IN CRIMINAL CASES MAY NOT BE RESERVED AS GROUNDS FOR COLLATERAL ATTACK ON THE JUDGMENT.

Closely related to the rule that habeas corpus cannot be used as an appeal or writ of error is the rule that defenses available to a defendant in a criminal trial may not be withheld or reserved at the time of the criminal trial and appeal therefrom and later raised or pursued in habeas corpus. *Glasgow* v. *Moyer*, 225 U.S. 420; *Kaizo* v. *Henry*, 211 U.S. 146; *Carruthers* v. *Reed*, 102 F.2d 933 (CA 8th), cert. denied 307 U.S. 643; *In re Abreu*, 27 Haw. 237; *Ex Parte Mitchell*, 35 Calif.2d 849, 221 P.2d 689. As stated in *Glasgow* v. *Moyer*, *supra*:

> ". . . It would introduce confusion in the administration of justice if the defenses which might have been made in an action could be reserved as grounds of attack upon the judgment after the trial and verdict."
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> 225 U.S. 420, 430

More particularly on the charge of perjured testimony, it was held in the *Mitchell* case that a defendant may not remain silent in the criminal trial and subsequently urge in habeas corpus that the prosecution's testimony was perjured.

XI

ALL OTHER GROUNDS URGED FOR REVERSAL ARE ALSO WITHOUT MERIT.

A. Rejection of testimony of Francis Hughes.

Appellants sought to impeach the testimony of Detective Stevens, who testified in the murder trial.

Since he was not available at the habeas corpus hearing, his former testimony was read into the record in the hearing. The impeaching testimony offered consisted of an alleged inconsistent statement made after the murder trial. No foundation for the impeachment as required by section 9843, Revised Laws of Hawaii 1945, was laid. The court below, following *Mattox* v. *United States*, 156 U.S. 237, rejected the testimony. *Accord: People* v. *Hines*, 284 N.Y. 93, 29 N.E.2d 483; *Nagi* v. *Detroit United Ry.*, 231 Mich. 452, 204 N.W. 126; *Lerum* v. *Geving*, 97 Minn. 269, 105 N.W. 967; *Baker* v. *Wyatt*, 49 Ga. App. 410, 175 S.E. 678.

B. Rejection of other testimony.

Appellants complain of the ruling of the court below in rejecting the testimony of Ernest Heen, Jr., Ernest Heen, Sr., and the personal records of the police department regarding Vernal Stevens, all of which were offered for the purpose of impeaching on a collateral issue the testimony given on cross-examination by Captain Straus and Chief of Police Hoopai, who were witnesses for the appellee.

It is fundamental that the answer of a witness on cross-examination as to a collateral matter is binding on the cross-examiner and may not be contradicted. 58 Am. Jur. 433, § 784; 3 Wigmore, Evidence §§ 1001-1003 (3d ed.); *Martin* v. *United States*, 127 F.2d 865 (CA D.C.)

Furthermore, this Court will not decide what the rules of evidence should be in the courts of the Territory of Hawaii. *Palakiko* v. *Territory of Hawaii*, 188 F.2d 54 (CA 9th).

C. Majors' prior conviction for burglary.

Majors was convicted of the crime of burglary in 1945 and was sentenced to be imprisoned at Oahu Prison for a term not exceeding ten years.[206] The question of the validity of the burglary conviction would seem to be quite immaterial unless and until the murder conviction is held to be invalid. Such moot questions will not be considered in habeas corpus. *In re Lincoln*, 202 U.S. 178. See also *McNally* v. *Hill, Warden*, 293 U.S. 131, and *Ex Parte Russell*, 52 Okla. Cr. 136, 3 P.2d 248, where it was held that habeas corpus relief is unavailable where the petitioner is lawfully in custody for another offense.

D. Charge of unlawful arrest.

While it is absurd to speak of the "unlawful arrest" of an escaped convict, nevertheless the matter will be given brief attention.

A prisoner will not be discharged from custody by habeas corpus on the ground that there were errors or irregularities in his original arrest, commitment or detention, where there is sufficient basis for his imprisonment, whether by indictment or judgment. *Yordi* v. *Nolte*, 215 U.S. 227; *Frisbie* v. *Collins*, 342 U.S. 519; *Hall* v. *Johnston*, 86 F.2d 820 (CA 9th); *Price* v. *Johnston*, 144 F.2d 260 (CA 9th), cert. denied 323 U.S. 789; *Young* v. *Sanford*, 147 F.2d 1007 (CA 5th), cert. denied 325 U.S. 886.

The *Frisbie* case is an extreme case of unlawful arrest and detention recently before the Supreme Court. There the petitioner sought habeas corpus

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relief on the grounds that while he was living in Chicago, Michigan officers forcibly seized, handcuffed, blackjacked and took him to Michigan in violation of the Federal Kidnapping Act (18 U.S.C. 1201). The Court nevertheless stated the rule to be as follows:

> "This Court has never departed from the rule announced in *Ker* v. *Illinois*, 119 U.S. 436, 444, that the power of a court to try a person for crime is not impaired by the fact that he had been brought within the court's jurisdiction by reason of a 'forcible abduction.' No persuasive reasons are now presented to justify overruling this line of cases. They rest on the sound basis that due process of law is satisfied when one present in court is convicted of crime after having been fairly apprized of the charges against him and after a fair trial in accordance with constitutional procedural safeguards. There is nothing in the Constitution that requires a court to permit a guilty person rightfully convicted to escape justice because he was brought to trial against his will."
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> 342 U.S. 519, 522

CONCLUSION

In many respects appellants' case has followed the now rather familiar pattern of a broad, diversified attack on law enforcement agencies, in which appellants have had the advantage of being able to make serious charges with complete irresponsibility. It has been the purpose of this brief to refute all of the charges, though not point by point, for in taking down a tree it is just as effective to cut it off at the trunk as to lop off branch after branch.

It is submitted that appellants have failed to sustain any of their assignments of error and that therefore the judgment of the court below should be affirmed.

Dated at Honolulu, Hawaii, this 6th day of October, 1952.

Respectfully submitted,

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